IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MRS. JUSTICE K.HEMA

WEDNESDAY, THE 21ST NOVEMBER 2007 / 30TH KARTHIKA 1929

CRL.A.No. 89 of 2007

SC.137/2004 OF ADDL. SESSIONS COURT (ADHOC)-I, KALPETTA.
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APPELLANT/ACCUSED:

KURUNTHAN,
S/O.VELLAN, 39 YEARS, WORKING AS A KOOLIE,
PULPALLY, KALPATTA.

BY ADV. SRI.PROMY KAPRAKKATT,
ADV. SRI.K.N.ABHILASH.

RESPONDENT/ COMPLAINANT:

THE STATE OF KERALA REPRESENTED BY THE,
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. NOBLE MATHEW.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 21/11/2007,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY & K.HEMA, JJ.

Crl.A.No.89 OF 2007

Dated 21st November, 2007

JUDGMENT

Koshy,J.

Three accused were charge-sheeted for offences punishable under Sections 323 and 302 read with section 34 of the Indian Penal Code. First accused being a juvenile, his case was transferred to Juvenile Court. Second accused was absconding and the third accused alone faced trial. Trial was delayed as the third accused who was arrested on 29.1.1997 was also absconding after release on bail. He was again arrested only on 27.05.2005. He filed this appeal as he was convicted and sentenced for the offence punishable under section 302 of the Indian Penal Code. Prosecution case was that on 24.1.1997 at about 6 p.m. in furtherance of the common intention to kill Ukkan, A1 hit on the head of Ukkan with a granite stone and A2 and A3 beat and hit him with hands and kicked him at Mullankolly town due to the enmity for return of Rs.60/= from A2 which was borrowed by him from the deceased. Thereafter, the deceased proceeded to his house and when he reached at Palakolly at about 8 p.m. on the same day, the third accused beat on his head and back with hands and voluntarily caused hurt to him. Thereafter Ukkan was taken to Medical College Hospital, Kozhikode and while he was undergoing treatment there, he succumbed to the injuries on

27.1.1997 at 3 p.m. To prove the prosecution case, 13 witnesses were examined, 20 documents were marked and MO1 shirt and MO2 granite stone were produced as material objects. No evidence was adduced for defence. In 313 statement there is complete denial. According to the prosecution, PW5 A.S.I. of Police on getting wireless information from the hospital went to the Medical College Hospital, Kozhikode and a statement was taken from the deceased which was treated as F.I. Statement in this case. Ext.P5 is the above statement given by the deceased to him. According to the deceased, on 24.1.1997 by 6 O' clock while he was returning after finishing his work in the house of Kaduppil, he saw his friend Kuttakkan (A2), his brother shiju (A1) and their uncle Kurunthan (A3). He also stated that A2 borrowed Rs.60/= from him three months ago and he requested for returning the money. A2 refused to give it and started quarrel and beat him on his back and head and he fell down. Then A1 took a big stone and hit him behind his head. A3 also beat him on his back and head by hand. He started walking to the house where he was doing work and when he reached near their house by 8 O' clock A3 again beat him on his back and head with hands. He crawled to the house of his father's sister Kombi. Then his employer Devasia came and looked him and Narayanan and Velli took him to the hospital. He was taken to Mananthavady Government Hospital and he got

consciousness by 2 a.m. He sustained serious injuries on his neck and he became physically paralysed up to the foot. He also stated that A2 hit him with stone and A1 and A3 beat him with hands only with the intention of causing death to him . Ext.P5(a) is the body note which shows that he was paralysed from neck till the foot and he was tied in the cot in such a way that preventing him from moving the head. He has knee injury also. Ext.P2 is the dying declaration given to Dr.Roy B.Kuruvilla in presence of Dr.Mohammed Shakkil (PW3) and thumb impression of the deceased was taken. To the doctor also he stated that when he asked for return of Rs.60/= given to A2, A1, A2 and A3 hit him with the granite stone at 6 O' clock and thereafter at 8 O' clock A3 beat him with hands and, therefore, he was taken to Mananthavady hospital. He also stated that he belongs to Adivasi Paniya caste and accused also belongs to the same caste. In this connection we also refer to Ext.P3 wound certificate. In that certificate the history and alleged cause of injury is stated as “alleged assault by three people”. It is also noted that there is cervical spine injury C3 quadri plegia. PW3 gave evidence to prove Ext.P2 dying declaration. PW4 was examined to show that he took the deceased to the hospital along with Narayanan (PW6) and Madhavan (PW11). PWs 6 and 11 turned hostile as they denied their 161 statement and deposed that they have not seen the incident, but, they

have stated that they have accompanied the deceased in the jeep to the hospital. None of the witnesses has stated that they have seen the incident.

2. PW10 conducted postmortem examination and the following ante-mortem injuries are noted in Ext.P16 postmortem certificate:

> "1. Abrasion 1x1cm. Back of right elbow.
>
> 2. Abrasion 0.5x0.5cm on knuckle of right ring finger.
>
> 3. Abrasion 2x1cm. Just below front of right knee.
>
> 4. Abrasion 0.3x0.3cm on front of right leg 7cm. Above ankle.
>
> 5. Abrasion 0.5x0.5cm on upper aspect of left big toe 1cm behind nail.
>
> 6. Abrasion 0.5x0.5cm on outer aspect of left elbow.
>
> 7. Vertical graze abrasion 1x1cm. on outer aspect of left abdomen, at the level of top of hip bone.
>
> 8. Vertical graze abrasion 4x4cm. On outer aspect of left chest 14cm. below axilla.
>
> 9. Vertical graze abrasion 5x5cm. on outer aspect of left chest 14cm below shoulder and 7cm. away from midline.

10. Transverse graze abrasion 4x4cm., 3cm below injury No.9.

11. Linear abrasion 3cm transverse on outer aspect of left upper towards top of shoulder.

12. Abrasion 0.5x0.5cm on back of right shoulder, 4cm, below top and 15cm away from midline.

13. Abrasion 1x1cm on front of middle of right scrotum.
(All the above injuries were covered by reddish brown scab)

14. Scalp contusion internally 2x2cm on left half of back of head, 3cm. Away from midline, 7cm. Above foot of neck (dark red).

15. Transverse fracture of separation of body of 3rd neck vertebra with infliltration of blood to the tissues around and into the spinal cord.

16. Two incised puncture wounds 0.4x0.3cm., each, bone deep on both sides of head 6cm. Above ears. (surgical).”

With regard to the cause of death it is stated as follows:

> “The cause of death was injury to neck vertebra. All the abrasions can be caused by forceful fall as pushed down by a third person. If the injury is caused by hitting with hand or if the surface where the deceased was fallen is not so rough, external injury need not be there on the neck. The fatal injury can even be caused by

sudden bending of neck."

It is also stated that all injuries except 14 and 15 are external and visible. Originally the case was registered under sections 323 and 307 read with Section 34 of the Indian Penal Code. Later section 307 was altered to section 302 IPC.

3. It was argued vehemently by the counsel for the appellant that dying declaration relied on by the prosecution as well as trial court cannot be relied on as there are differences in the dying declaration. In Ext.P5 F.I. Statement which was given to the police it was stated that he crawled to Kombi's house. That was absent in Ext.P2 dying declaration. Further, he was taken from the road side and not from Kombi's house and no certificate was issued by the doctor to the effect that he was able to speak and well oriented at the time of taking Ext.P5. We are of the view that in view of Section 162 (2) there is no bar in relying on the dying declaration given to the police and it can be acted upon if the above dying declaration is liable and trustworthy. But, in this case there is no evidence to show that police has taken the statement when he was capable of giving such a statement. Even if he has given a statement, it may contain exaggerations. There is no evidence in this case that he crawled to

Kombi's house and he was taken from there to the hospital. Evidence of PW4 shows that he was taken to the hospital from road side. There is nothing to disbelieve PW3 doctor who has recorded Ext.P2 dying declaration. When doctor took the statement, he was fully conscious. Doctor has no enmity towards the accused. In Ext.P2 dying declaration it is stated that A1 to A3 hit him with granite stone at 6 p.m. and later at 8 p.m. A3 beat him with his hand and later he was taken to Mananthavady hospital. From there finally he was brought to Medical College Hospital and by 8 a.m. his hands and legs were paralysed. The motive was also stated by the deceased in Ext.P2 that the quarrel started when he demanded Rs.60/= borrowed from him by A2. Even though names are not stated in the wound certificate, in the first statement regarding the incident it is recorded that it was caused by assault by three persons. There is nothing to disbelieve PW3 doctor and Ext.P2 dying declaration. But, the question is even if Ext.P2 dying declaration is accepted, whether appellant can be convicted for murder even with the assistance of section 34 IPC. Admittedly, none of the accused was armed. When deceased demanded money from A2 suddenly a quarrel might have been started. There is no evidence to show that A1 to A3 used weapons or they were waiting for deceased to come. The granite stone was taken from the ground and no one has pre-plan or intention to kill.

But, at the maximum the intention was only to cause grievous hurt. There is no evidence to show the origin of the incident. It is also stated that on return after 8 p.m. also A3 beat him on his head with hands. It is true that there is no evidence to say that which accused caused the fatal injury. But, in this case, at the maximum what can be gathered is that all the three accused beat him and hit him between 6 p.m. and at 8 p.m. A3 beat him with his hands. It was argued that at the maximum the offence is punishable under Section 325 read with section 34 of the Indian Penal Code. It is not stated that all the three accused were having separate stones. Only one granite stone was used. Narration of 2nd incident shows that appellant (A3) used only hands. There was also no evidence to show that stone used was a dangerous weapon. In this connection we refer to the decision of the Apex Court in **Mathai** v. **State of Kerala** ((2005) 1 Supreme 215). The stone was picked up from the road side. The evidence of investigating officer is silent about the nature of the stone, the weapon of offence. It is true that no charges were framed under section 326 IPC, but, originally charges were framed under sections 323 and 307 IPC. It is changed to section 302 after death. He died after three days. On the basis of Ext.P2 alone we are unable to sustain conviction under Section 302 IPC. PW10 doctor who conducted postmortem examination also did not say that any of the

injuries are sufficient in the ordinary course to cause death. There is also no evidence to prove the genesis of the incident There is no evidence to show that A3 used any weapon. We modify it to charge under section 325 IPC. Therefore, conviction and sentence of the appellant under section 302 IPC is set aside and he is convicted under section 325 IPC. Then the question is what is the punishment to be imposed. We have already seen that even though A3 also was in the company of A1 & A2, there is no evidence that A3 used any weapon. It has come out in evidence that subsequent to the incident, after he jumped out from jail he got some injuries and his right leg was was amputated. Taking all these facts, we impose a sentence of three years' rigorous imprisonment to the appellant, (third accused) for the offence punishable under section 325 IPC. He is also entitled to the right of set off.

The appeal is partly allowed.

J.B.KOSHY
JUDGE

K.HEMA
JUDGE

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